New Mexico conclave speech format

Judges' Conclave
New Mexico
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Thank **Judge Linda Vanzi** and **David Levin and Celia Ludi**

Thank **Pam Lambert** and **Victoria Garcia**

I. Introduction: I am honored by the invitation to speak with you,

but intimidated by my assignment.

ADR . . . . Ho Hum.

> We already know as much as we need or want to know to about that.
>
> And we certainly don't need to hear more about this subject from someone
>
> > who admits to residing in the San Francisco area,
> >
> > who works in a federal court, and
> >
> > who sits on the lowest judicial rung of that remote and over-long ladder.
>
> Oh boy, we get to hear from someone who is an outlier in an outlier jurisdiction.

Well, despite all this presumptively disabling baggage, I really want to try to be useful to you.

You are judges, very busy judges, so why should you be interested in this subject?

Why are we talking about this?

1. On some occasions, some of us host settlement conferences –

and we might find it useful to know about some of the process developments in this field,

e.g., ideas about how to approach the impasse problem in settlement negotiations.

2. Often, many of us will have occasion to consider **whether** and **when** (at what juncture) to refer a case to an ADR process –

(a) How might we **integrate** such a referral **into our case management plan**.

How can we use ADR to improve case development planning? And,

How can we use case management to improve the productivity of ADR?

(b) **What should we say about ADR to counsel (and parties)** during case management or status conferences?

How might we respond to counsel's or their clients' objections to or concerns about trying an ADR process?

(c) **Which kinds of benefits are best delivered** by each of the major types of ADR processes?

And what are the principal limitations of each of those processes?

3. **What is Early Neutral Evaluation *and*** in what circumstances might it be the most promising form of ADR?

4. W**hat can be done in the ADR arena by courts that have no significant resources** to commit to ADR?

Or by courts that serve rural populations and that are served by a relatively small bar?

5. Can ADR can make contributions in **criminal proceedings**?

If so, what kinds of contributions and in what kinds of circumstances?

In the breakout session this afternoon we will focus primarily on ADR in **civil litigation**. Among other things, we will try to:

(1) identify factors or circumstances that favor, and those that disfavor, referring cases to ADR;

(2) discuss the timing of referrals to ADR;

and we will try to identify factors or circumstances that favor, and that disfavor, early referrals to ADR, and

(3) discuss how to match individual cases with the form of ADR that holds the most promise for the particular case.

At this juncture some of you might well be thinking:

before you slide us down a slippery slope into these topics,

why don't you first address the biggest questions,
the hardest questions.

- **What can ADR do for the system of justice?**
- Where is the value-added?
- Why should **courts** have anything to do with this stuff?

Why shouldn't we leave all this touchy-feely business to the private sector?

II. Context

My thoughts about these matters are informed by some basic premises that I should outline at the outset.

I believe in public institutions.

I believe that our democracy cannot be healthy unless our public institutions are healthy.

I believe that our public institutions cannot be healthy if a large portion of the population believes that

➜ they are inaccessible, or that

➜ the services they purport to offer can be afforded by only a small percentage of the people.

The system of civil justice is a lot bigger than the court system.

And, like it or not, ADR has come to play a major role in the system of civil justice.

> In fact, knowledgeable commentators believe that ADR has penetrated the field so thoroughly that anticipation of and preparation for ADR events has come to dominate civil litigation practice.
>
> See, e.g., Julie MacFarlane's new book, The New Lawyer: How Settlement Is Transforming the Practice of Law.

Why has this happened?

For the common man or the common company, even for the uncommonly big company that has only a modest-sized dispute:

> We cost too much.
>
> We take too long.
>
> There is way too much indirection, inefficiency, and friction in our procedures.
>
> We and the lawyers so dominate the system, and so straight-jacket the parties with procedural constraints, that we **alienate** all but those with the thickest of skins, or with the deepest of pockets, or with the most thoroughgoing cynicism.

The "alienation" that I am talking about is not just some fuzzy ideological hangover from the 1960's.

Rather, the alienation from us that many people feel is rooted in hard realities: we preside over an adjudicatory system

that the people do not understand,

in which they do not participate meaningfully, and

over which they have no power.

Most people come to us only because they have to –
only as the option of last painful resort.

They don't come because they feel welcome.

And they are not animated by gratitude for services anticipated.

The **upshot** of all this is that,

to an extent that we probably fail to appreciate,

for a substantial portion of our people,

we have succeeded in **marginalizing ourselves**.

Permit me to develop these themes by looking at the civil court system from another perspective.

Let's assess our *civil* courts as service institutions:

Courts are the institutions of government in our democracy that are primarily responsible for

providing peaceful means for resolving disputes and

for giving reality to rights under the law.

How well do the courts meet this service obligation?

The data with which I respond to this question are from federal trial courts –

and it is quite likely that the data would be somewhat different for state trial courts, but I suspect that the essentials of the situation are similar in the two court systems.

● In what percentage of general civil cases do courts provide trials?

Fed courts: less than 2%.

● What percentage of general civil cases are resolved by rulings on motions for summary judgment?

Fed courts: less than 10%

● What percentage of the cases are resolved by rulings on other kinds of contested motions?

Fed courts: less than 5%

● In sum, what is the percentage of general civil cases that are resolved on the merits by the exercise of judicial power after contested proceedings?

Fed courts: less than 20%

What kind of service do the other cases get from the courts?

Some get nothing; others get

A little case management, or

A ruling or two on discovery disputes, or

A ruling on some other kind of non-dispositive motion; and

Some secure default judgments;

[in my court, less than 3% of the cases are terminated by default judgments].

The bottom line is this:

a substantial percentage of general civil cases

leave the court system, at least the federal court system,

without having received any service of significant value from any judge.

Why? Why do so many cases leave the courts before receiving any significant service from the judiciary?

While many factors undoubtedly contribute to this situation,

I suspect that the single biggest element in this equation is the

growing disproportion between

the real economic value of general civil cases and

the transaction costs of the formal adjudicatory process.

What does ADR have to do with all of this?

Given the economic facts of civil litigation life, I believe that it is

only by sponsoring

high quality and free or low-cost

ADR programs

that *courts can expand significantly*

the *percentage of cases* to which they,

in alliance with the bar,

deliver valuable service.

Why might we want to expand

the percentage of cases or kinds of litigants

to whom courts actually deliver valuable service?

Why do we care?

Like an exasperating law professor or therapist,

I will respond to these questions **by posing more questions**.

➜ Is **shriveling the significance** of the judicial system healthy for our democracy in the long run?

➜ Do we want the **system to evolve, on our watch**, toward a state in which

(1) parties who can afford the **best justice** go private,

(as in Abu Dhabi), and

(2) parties who **cannot afford private justice** either

(a) get none, or

(b) get "justice" only at a cost that is disproportionate to the value of their case?

III. I would like to use the history of the ADR program in my court

to illustrate these views, and

to ***offer you some ideas*** that you might use

- when you are discussing ADR with parties, or
- when you are trying to decide whether to refer a case to ADR.

This history also serves as a good vehicle for illustrating

- ➢ how many different purposes ADR can serve,
- ➢ how many different benefits it can deliver,
- ➢ how it can be integrated into and improve larger case management systems,
- ➢ how appreciated by lawyers and litigants it can be, and
- ➢ how a useful program can be launched with relatively few resources.

There are two integrating themes in this story line:

- ➜ how important judicial leadership can be, and
- ➜ how interdependent bench and bar are.

The story of the ADR program in my court is
a sustained tribute
to how much good lawyers can do, and
to how much service they are prepared to render.

> From the inception of our program about 30 years ago, the people who have served in the roles of the neutrals (our arbitrators, evaluators, and mediators) have been private lawyers.
>
> Most significantly, these private lawyers have volunteered the vast majority of their time for free – the time to be trained, to serve in individual cases, to train new volunteers, and to help us refine our procedures and rules.

The history of ADR in my court also illustrates how much court programs can do for local lawyers:

> The history of the ADR program illustrates how much a good court program can improve the quality of counsel's practice-life and increase demand for their services.
>
> The visibility and legitimacy that my court's program have given to ADR processes over the years have helped
>
> > increase party and lawyer confidence in ADR,
> >
> > demonstrate ADR's value to the larger community of clients and lawyers, and, thereby,
> >
> > expand demand for ADR services in the private sector.

There is no way that a court program, even a program as well developed as our is, could even begin to satisfy the demand for ADR services –

> so, in my district, there is **virtually no tension** between the program we sponsor and the community of private providers.

Instead, many prominent private providers and leading litigators volunteer to serve in our program for free –

> in part for the training,
>
> for the points with the judges, and in part
>
> for the cachet (to put a certificate from the court on their wall and in their resume),
>
> **but also**
> ✶ because they want to give something back, and
>
> ✶ because of the personal satisfaction they get from serving in the neutral's role.
>
> They love having only one purpose: to help others;
>
> They love being in a role where the most effective means are also the purest, where they feel no pressure to cut ethical corners or to pursue questionable ends.
>
> and they love the client they serve, the most beautiful client anyone ever could have: justice.

One key to maintaining this mutually supportive and symbiotic relationship between the court and the bar is to involve a diverse, highly regarded group of lawyers and mediators in the court's program from the outset.

Actively solicit input from the bar about the basic policy question: should the court adopt an ADR program and, if so, what should it consist of?

Program design.

Testing and assessing the initial design.

Making changes and adjustments before the program moves from a pilot stage to broader implementation.

Teaching – neutrals and users (repeat players and the community at large).

Periodic reviews, studies, assessments – and making changes in rules/program design as circumstances change or on the basis of what is learned through experience.

II. The History of ADR in the Northern District of California

This is a history **driven by one overriding purpose**: to search for ways to improve the service the court delivers to litigants and lawyers.

It is a history that has featured open-minded experimentation:

When we began each major program innovation

we clearly acknowledged that we did not know

whether it would deliver net benefits to the parties or
whether the benefits delivered would outweigh the burdens the program entailed.

This acknowledgment was accompanied by firm commitments

➜ to test and assess objectively each new program or feature,

➜ to systematically solicit the views of affected lawyers and litigants, and,

➜ to promptly abandon any program or component that did not deliver net benefits, or that was disapproved by a substantial percentage of the affected lawyers or parties.

So, from the outset, we set up systems to collect data (from users and neutrals) about each new component of our program;

we experimented, tested, assessed, learned from mistakes, and made responsive adjustments or changes.

These systems for collecting data served as the foundation for a key aspect of our larger system of QUALITY CONTROL.

In a program like ours, quality control is extremely important – because we press parties to participate in ADR and we often provide the neutral –
who then acts in essence as an agent of the court.

The major components of our larger system of quality control:

1. Establishing qualifications for neutrals to join our panels.

2. Selecting well qualified neutrals as to whom no judge has any substantial reservations.

3. Directly training all of our neutrals – even if they have been trained elsewhere already.

4. Offering neutrals opportunities to observe and to co-mediate before turning them loose on their own.

5. Collecting feedback systematically from all participants about how the neutrals performed.

6. Providing coaching and advice when concerns surface.

7. Establishing a visible procedure for lodging complaints with the program administrator and/or to the ADR Magistrate Judge.

8. Providing continuing education: practice groups, brown bags, seminars, and full-scale advanced training sessions.

9. Hosting events to express the court's gratitude and to cheerlead.

From the outset, our Chief Judge made the court's motives clear –

which is very important,

because many people will assume that the court's motives for promoting ADR are institutionally selfish,

i.e., to reduce the judges' workload.

➜ Our Chief Judge made it clear that the court was not encouraging parties to use ADR because the court wanted to get rid of them.

➜ He made it clear that the court was not annoyed by parties who chose to pursue their **legal rights** – and that the judges did not feel

that parties who choose to litigate rather than to settle

are morally inferior to parties
who elevate settlement or peace
above strict enforcement of their rights.

➜ He made it clear that the court would **not** penalize parties for declining to use ADR or for failing to settle –

e.g., by making them wait longer for a trial or a ruling (disposition)
or
by making them pay extra fees if they didn't do better through the judgment they received than they could have by settling.

➜ He made it clear that our support for ADR was not rooted in disrespect for the established adjudicatory system.

He taught us that one way to protect against inadvertently denigrating the litigation process when we sponsor or encourage ADR
is to emphasize to the parties that

they are **NOT making an "either/or" choice**
when they are deciding whether to engage in ADR.

Instead, he **emphasized that parties can use the two systems in tandem**,

that ***each process can be used to improve the other***.

A. Parties and lawyers who might intend **ultimately** to use ***ADR*** can **USE the COURT SYSTEM**:

1. To focus the attention of another party on a particular matter.

2. T**o acquire information/evidence** that they need in order to engage responsibly (wisely) in settlement negotiations,

e.g., use the judicial process to acquire evidence/information from non-parties.

3. T**o narrow the issues (e.g. through formal stipulations or through court rulings), or**

4. To help accelerate or pace the process (by having the court set deadlines for decision-making, etc.).

B. Parties and lawyers who **intend ultimately** to use the **litigation** process to resolve their dispute can **USE ADR** to:

1. Determine more reliably **whether** they really need to use the court system to resolve their dispute;

Reduce the risk of false failure of settlement negotiations;
social error,
analytical error,
mis-guessing what terms are accessible, or
insufficient tenacity.

2. To position themselves to use the court system:

a. more efficiently (e.g., finding the center of the case, narrowing and clarifying issues) and

b. in a way that increases the likelihood that the judicial outcome will be fair, e.g., that

(1) the important issues will be squarely joined,

(2) all the significant evidence will be presented,

(3) the pertinent law will be accurately identified, and

(4) the analyses by the parties and the court will be as sophisticated and reliable as possible.

I would like to offer one example of how we sometimes integrate ADR into an overall case development plan:
the **two-stage approach** to the pretrial process.

THE DEVELOPMENT OF AND OUR EXPERIENCE WITH SPECIFIC ADR PROCESSES

1. 1978: NON-BINDING ARBITRATION

Source of concept:

Office for Improvement in the Administration of Justice within DOJ during the Carter Administration.

Why was our court selected to be one of only three federal district courts to experiment with this new program (and given a little extra staffing?)?

CJ and Clerk of Court.

Problems to which this program was intended to be responsive:

lack of fit between forum and fuss:

traditional litigation in federal court
cost too much and took too long
for modest sized cases
in which the law was well-established.

Proposed Solution:

a compact, efficient process

that would give litigants access to something akin to their day in court

much sooner and at less cost

than they could secure through the traditional litigation process.

Procedure:

telescoped and limited discovery,

leading to a non-binding arbitration event

about 8 months after the complaint was filed

[compared to the two years it would take to get to trial].

Kinds of cases:

presumptively mandatory for

tort and contract cases whose value was $100,000 [later $150,000] or less.

Why presumptively mandatory?

Fear that very few cases would be "volunteered" by both sides into the new program;

➜ Need to overcome litigants' and lawyers' inertia, their fear of the unknown, and their reluctance to learn how to navigate a new and faster-paced system;

➜ Need to push past the lawyers' perceived short-term economic self-interest and their worries about malpractice.

Neutrals (the arbitrators):

Members of private bar,
with appropriate experience,
paid small fee with government funds to
serve as a single arbitrator or in panels of three.

Product:

A non-binding award, with

Right to trial de novo fully preserved;

But no follow-up settlement process as part of this program.

Our experience with this program at its height:

● Only 15% of the cases made it to the arbitration hearing.

The arbitration hearing constituted an earlier external event that pressed counsel, litigants, and insurance adjusters to do their investigative homework earlier and to try to make decisions about settlement before spending a lot of money on the litigation.

● Of the cases that went through a hearing, more than half filed a request for trial de novo – but only a tiny fraction of those went on to trial.

We assume that in most cases the arbitration event helped move the case into a posture where the parties could settle it.

Assessments: Even though participation was essentially compelled.

➤ 80% or more endorsed the program overall;

➤ 90% or more endorsed its fairness;

A key finding from surveys of parties and lawyers:

See ***handout*** graphic

Taking fairness, cost, and delay into account,

substantial majorities of parties and lawyers

would rather have their case decided through the arbitration track

than by jury or court trial.

Kinds of cases **for which non-binding arbitration seems especially well-suited:**

➜ law well settled;

➜ sources of key evidence fairly predictable and accessible;

➜ only monetary relief being sought;

➜ one or more of the parties really needs:

(1) his day in court –

✶ to be heard, tell his story; and/or

✶ to receive something akin to a judgment; and/or

(2) to be educated by being able to compare his case directly to his opponent's case – to see them presented side by side, and/or

(3) to get neutral feedback on the relative credibility of competing testimony.

2. EARLY NEUTRAL EVALUATION (ENE)

A. Judicial Leadership ---- Chief Judge Robert F. Peckham.

1. *Appointed and inspired* a broadly based **Task Force**.

CJ Peckham's message: We are doing something constructive for the smaller cases (the non-binding arbitration program),
but we need to do something for the other civil cases.

It costs too much and takes too long to get cases through our court.

(2) Involved leaders of the bar from a broad range of practice areas in **assessing** the situation, **identifying problems**, then in **designing** possible solutions.

A key: have the lawyers be the sources of the ideas/programs.

Have the lawyers present their assessments and proposed responsive program to the other judges of the court.

(3) Found a workhorse or two to pull the lead oars and to coordinate and integrate the work of the Task Force.

(4) Chief Judge: sent out a call to the bar for volunteers to serve as neutrals – [leaders already in, so joining = cachet]

promising them that they would be asked to serve for free in no more than 2 or 3 cases per year.

(5) When the volunteers came to the courthouse for training:

He welcomed, thanked, and cheerled them.

And he inspired them with the spirit of service.

(6) Continuing Moral Support: periodic events to express court's gratitude and to cheerlead the volunteers.

B. How the lawyers on the Task Force went about inventing ENE

(1) The lawyers identified the principal sources of **unnecessary** cost and delay.

See the handout entitled "Problems ENE Can Address."

Note that the driving purposes of ENE are to improve the traditional litigation process – not to displace it.

ENE was designed to supplement and complement the case management efforts of the judges and the lawyers –

to improve the efficiency and enhance the rationality of the litigation process.

ENE also was designed to:

(a) reduce party alienation from the litigation process (don't understand, don't participate, have no power), and

(b) tap clients as sources of economic discipline and common sense – both in the litigation process and in settlement negotiations.

(2) After identifying sources of unnecessary cost and delay, the Task Force lawyers designed a **process** that would provide litigants with **tools to attack** those sources.

ENE was designed to be an externally imposed event that,

relatively early in the pretrial period, would

force the parties to communicate, and would

pressure them to do their core investigative homework,

to assess their situation in the litigation more objectively with the assistance of a second opinion, and

compare more systematically the pros and cons (financial and otherwise) of the various paths ahead.

Because providing neutral **evaluation** was at the **core** of this new process, it was important that

The Neutral Host have:

✶ case-specific **subject matter expertise**;

✶ at least 15 years of law practice; and

✶ be trained by the court in how to conduct an ENE session and how to host mediations.

C. **What is the ENE process?**

See the **handout** entitled "Essentials of the ENE Process."

Purposes/benefits: In addition to cutting cost and delay:

(a) ENE can **enhance the quality of justice by**:

(1) expanding the parties' information base,

(2) improving their analyses (of law and of likely inferences from the evidence), and

(3) sharpening the joinder of issues

(b) Help **promote settlement**:

About 30% of the cases settle at the ENE session,

but

62% of the lawyers report that ENE enhanced prospects for settlement.

See handout that summarizes purposes and benefits:

D. **Our experience with ENE**: lawyer and party assessments.

See Rosenberg and Folberg, Alternative Dispute Resolution: An Empirical Analysis, 46 Stanford Law Review1487 (July 1994).

See Assessments of ENE: **see handouts**.

E. **Case-specific Factors Favoring and Disfavoring Referral to ENE**

See handout.

F. **ENE/Mediation: joint sessions v. private caucuses**

(a) In ENE, parties/lawyers can have more confidence in the integrity of and bases for the neutral's evaluative input than in mediation that has included private caucusing –

> because everyone gets to see everything that goes into the evaluator's mind from the other side before the evaluator forms her evaluation.

(b) in ENE, all parties can be confident that they are receiving the same evaluative inputs from the neutral – because they all hear the same thing at the same time.

(c) ENE can deliver more value to case development planning

(d) ENE guarantees that each party and lawyer will have direct access to the lawyer and litigant on the other side (not access filtered by a mediator) –

> ENE – or joint sessions in mediation – give each participant opportunities to speak directly to and assess participants on the other side, or
>
> to display directly to the other side the sympathy or persuasive power a client or key witness will generate.

(e) If one or more of the litigants needs something like her day in court –

> or something akin to a "judgment" (e.g., for a sense of vindication) –

but also wants an opportunity to pursue settlement,

ENE can be more attractive than either non-binding arbitration or mediation (at least in many of its forms).

3. MEDIATION

A. Why did we add mediation?

(1) Its use had spread widely and it was viewed as a process tool with considerable potential.

(2) We viewed mediation as offering parties a different means to pursue some of the same values that they could use non-binding arbitration or ENE to pursue (e.g., rationality, efficiency, and increased party-participation),

(3) But we also understood that parties could use mediation to pursue a wide range of **other** values – values that could be very important to some litigants but that litigants could not pursue effectively through our other ADR options.

(a) Unlike ENE or arbitration, mediation encouraged parties to look beyond or beneath their litigation positions to identify their underlying or long-range interests – and to look for solution options in those kinds of extra-litigation interests.

(b) Mediation also encouraged parties to look past the past, to focus more on the present and the future, more on constructing than deconstructing.

(c) In addition, mediation could offer parties safe environments for the venting that sometimes is necessary to clear the way for wiser decision-making –

(d) Mediation also provided better opportunities for parties to

repair relationships or to

restore a sense of self

B. <u>After we added mediation</u> to our program, the court offered essentially <u>three kinds of processes</u>:

1. <u>Traditional litigation</u>;

<u>And two kinds of ADR processes</u>:

2. ADR processes that parties could use to <u>improve traditional litigation and to pursue the values that dominate the litigation</u> model: rationality and efficiency; or

3. ADR processes that parties could use to <u>identify which values were most important</u> to them with respect to a given dispute and then, if they chose to do so, to <u>pursue values that they could not pursue effectively through litigation</u>.

C. Assessments of mediation.

<u>See handout</u>. (1) Fair. (2) Benefits outweigh costs/burdens.

4. **THE MULTI-OPTION PROGRAM – implemented court-wide in the latter part of the 1990's**

A. What:

Participation in some form of ADR is presumptively mandatory, but

if they can agree, the parties select their process from the following:

1. Non-binding arbitration

2. ENE

3. Mediation

4. Settlement conference hosted by a MJ

5. Private process – tailored or customized, hosted by a neutral whom the parties select and pay.

B. Why?

➜ **Philosophy**:

(1) choice is good, per se, and

(2) giving parties a choice is more consistent with

(a) the mission of service, and

(b) the spirit of mediation (which is informed by principles of party-self-determination);

➜ Education: Requiring parties to choose would pressure them (counsel and litigant) to learn about each alternative process.

➜ Buy-in: the process of selecting a process for specific reasons could increase the litigants' and lawyers' sense of investment in the process – their incentives to make it productive.

C. Why offer both settlement conferences and mediation?

1. Our court has limited judicial resources to commit to hosting settlement conferences.

Fewer cases served; less time per case.

2. The skill sets of our judges are limited.

(a) in handling aspects of disputes that do not involve law and evidence; and

(b) in range of subject-matter expertise.

3. There can be significant differences between the two processes, as typically experienced.

Compared to mediations, judicially hosted settlement conferences

(a) are more likely to be limited by the host's impatience and her time constraints;

(b) are more likely to emphasize law and evidence almost to the exclusion of other factors;

Judges are not as likely to be comfortable dealing with emotions, and are

less likely to be trained to identify and work with non-legal interests or factors; and

(c) judicially hosted settlement conferences are less likely to give significant play to group sessions (as opposed to private caucuses).

Generally: ➜ While often there is some room in settlement oriented proceedings for trying

> to identify and work with underlying interests (rather than simply legal positions), and
>
> to deal with factors other than law, evidence, economy and efficiency,

the process tends to be dominated by concern with analysis and evaluation of the merits of the case –

> so other considerations and approaches are likely to get much less play – and to
>
> receive attention only secondarily and only later in the process.

➜ In some forms of mediation, by contrast,

> analysis and evaluation of the merits of the case are likely to play a much more limited and secondary role,
>
> while the parties are actively encouraged from the outset of the process to focus on underlying interests and to attend carefully to factors and values beyond the merits of the case that might be important to them,
>
> > e.g., their emotions, their relationships, their place in some community or in some work-setting, their sense of self, etc.

D. How have lawyers/litigants been voting with their feet?

Over the years patterns have changed – but the trend recently has been that:

1. mediation is chosen most often –

   usually with an evaluative component.

2. settlement conferences are the next most popular choice –

   and would be selected most often if the court did not limit their availability.

3. private providers – continuing to grow – up to about 25%.

4. ENE

5. non-binding arbitration

5. Lawyers' Assessment of Contribution by ADR to Court's larger System of Case Management:

An FJC study from mid-1990's:

Compared overall assessments of the court's system of case management by:

(1) lawyers whose cases had **not** been assigned to ADR with

(2) lawyers whose cases had been assigned to ADR.

Did the court's case management system reduce litigation **costs**:

Cases not referred to ADR: 26% said yes.

Cases referred to ADR: 43% said yes.

Did the court's case management system reduce **time** to disposition:

Cases not referred to ADR: 38% said yes.

Cases referred to ADR: 55% said yes.

5. ADR in CRIMINAL CASES

A. First, the National Picture of ADR in criminal cases:

See the ABA's recent "Mediation in Criminal Matters; Survey of ADR and Restorative Justice Programs"

(sponsored by several sections of the ABA, including Criminal Justice and Dispute Resolution sections; Spring of 2008):

http://meetings.abanet.org/webupload/CR1000/relatedresources/mediationsurvey.doc

It appears from this survey data that most existing programs involve

misdemeanors or lessor offenses and/or

juveniles – and that

they primarily target property crimes or inter-personal disputes that do not involve serious personal injury.

But see the new felony-mediation program in the state courts of Kentucky, overseen by Carol Paisley, Manager of the Mediation Division in the Administrative Office of the Courts in Frankfort, KY.

B. ADR in Criminal Cases in the Northern District of California

1. The most recently added feature of our ADR program.

2. Consists exclusively of settlement conferences hosted by magistrate judges.

3. Why has my court been slow to extend its 'mediation' services into the criminal arena?

(a) **Resistance by prosecutors**. Their fear that the purpose of the liberal magistrate judges would be to pressure the prosecutors into offering better deals.

Their fear of judicial encroachment on the prerogatives of the executive branch.

(b) The **court's fear** that defendants would believe or perceive that the purpose of the program is to pressure them to plead guilty.

3. What Are the Purposes of Our Program:

Not to reduce the trial docket or to get rid of cases;

Not to pressure defendants to accept offers from the prosecution or

to pressure prosecutors to make more generous offers;

Not to save taxpayer money by getting defendants who are charged with less serious offenses out of jail sooner;

Not to "restore" relationships between defendants and victims.

Rather,

➜ to help defendants better understand their situation and options,

➜ to help defendants better understand the difference between being prosecuted in state court and in federal court (for the same conduct),

➜ to help defendants sort through the emotions and values at play in their decisions and
to help them rank their values themselves,

thus to help defendants feel more centered in their decisions;

➜ to help defense counsel fulfill their duties to their clients

> Sometimes defense lawyers feel that their clients do not trust them – and that that distrust is preventing their clients from making choices that are in the clients' best interests –
>
> so defense counsel look to a judge to serve as a source of a somewhat more trusted second opinion; and

➜ to contribute a little to "restoring" the relationship between the defendant and the system of justice,

> or at least between the defendant and the judiciary.

IV. Timing of referrals of civil cases to ADR:

A. Decisions about timing should be informed, at least in part, by what the principal purposes of the referral are –

or what the principal benefits are that the parties hope to secure through ADR.

B. Involving the parties in a discussion about timing can

1. Teach them about the many benefits – in addition to settlement – that ADR sessions can deliver;

2. Make them feel more invested in the process, and

3. Remove some excuses for not preparing adequately.

C. Consider using **ADR** in **two-stages**:

The first stage consists of either

a shorter, less elaborate mediation, or

a "limited-purpose case management meeting"

that the mediator hosts for counsel (and, sometimes, the parties).

The principal purpose of the first event is to try to

identify what the parties need to do to maximize the value of a full ADR session and to

develop a plan to meet those needs before the full session is held.

D. Circumstances that ***favor*** ***early*** referral to ADR.

(1) The complaint includes many causes of action/claims and/or the answer includes many affirmative defenses – and it is not clear (to the litigants) where the center of the case is or which of the claims or defenses are most significant.

(2) There is a significant disproportion between litigation transaction costs and the realistic value of the case and the only relief being sought is monetary.

(3) Pertinent law is well-established and the key evidence can be developed relatively quickly from known sources.

(4) There is a well-developed "sociology of valuation" for this type of case and the injuries have stabilized.

(5) Liability is fairly likely and a prevailing plaintiff would be entitled to attorney's fees.

(6) Litigants have strong incentives to end the dispute relatively soon and to move on –

> e.g., the parties are business entities that will have a continuing relationship or that have substantial incentives to form a relationship.

(7) The lawyers on both sides are deeply experienced with this kind of case and

> know enough about what the evidence is likely to be
>
> > to be able to advise their clients responsibly about settlement.

(8) The outcome is likely to turn on the court's ruling on a legal issue that has significant long-range implications for at least one of the parties and

> that party wants to avoid a ruling on that issue in this case.

E. Circumstances that ***disfavor*** an *early* referral:

1. Generally: case is informationally immature but might have substantial value.

E.g., damages could be sizeable but the parties have not yet developed the evidence on which damages will turn (e.g., need expert reports/depos),

perhaps because physical injuries are significant but clearly not stabilized.

2. Delaying disposition clearly is in one party's best interest – so that party has no incentive to resolve the case soon.

3. Liability turns on subtle or complex evidence, or inferences from evidence, and

whether or not there is liability is extremely important to one or both sides (e.g., a "bet the company" case).

4. The parties disagree sharply about a question of law that is critical to outcome or settlement – and

neither side is afraid to take the risk of getting an unfavorable ruling on that legal question.

V. Independent of timing, which kinds of <u>Cases</u> might be especially <u>*GOOD CANDIDATES*</u> for referral to ADR:

A. The parties have a continuing relationship – need to get along.

B. Parties are business savvy and business considerations are likely to play a significant role in settlement decisions.

C. It is a fee-shifting case in which liability seems likely but the damages are not likely to be large.

D. There is a clear disproportion between likely litigation transaction costs and case value and

no basis for fee shifting, and

no powerful agenda external to the law and evidence.

E. At least one of the parties has a keen interest in preserving confidentiality – either of the character of the dispute or of terms of settlement.

F. A party clearly needs to vent or to process emotions, or clearly needs to be heard by a neutral person, before he will be able to give rational consideration to settlement.

G. Counsel and/or the parties seem to be unable or disinclined to communicate effectively – so there is a need to get them together in the same room, with a neutral, and to press them to exchange information and perspectives.

H. Counsel are inexperienced (at least in this kind of case) and need input (a second opinion) and guidance from a neutral with subject matter expertise in order to develop the confidence that will enable them to make settlement recommendations or to develop a sensibly focused case development plan.

VI. C<u>ases</u> that may ***<u>NOT</u>*** be good candidates for referral to ADR.

A. One party really needs or wants a decisive legal precedent or some other form of relief that only a court could deliver.

B. The real agenda of at least one of the party's is external to the litigation and settlement would threaten or frustrate that agenda (e.g., the case and the court are pawns in a much larger economic war between the parties).

C. The disposition of the case at bar could affect the disposition of other cases and

> (1) A party needs to delay that disposition as long as possible, or
> (2) A party needs to use the litigated disposition of this case to send a message to others or to gain an advantage in other cases/settings.

D. The suit pits two long-time, ideologically driven institutional adversaries whose decisions tend to be based more on their mutually exclusive agendas than on the evidentiary merits of individual cases.

E. The defendant is a public entity whose litigation decisions are driven by forces well-beyond the litigation itself – and a settlement on terms that would be reasonable based on the evidence in the case at bar would conflict with those external forces –

> e.g., the settlement would have to be approved by a politically vulnerable city council that recently has been lashed in the media for "caving in" in suits of the same kind.

F. Liability is uncertain, but the upside for one of the parties is very high, and the downside of losing for that party is small or non-existent (e.g., if plaintiff wins, he recovers a huge amount, but if he loses he suffers no significant adverse consequences because he will not be liable for his attorneys' fees – so the case could settle only if the defendant, whose liability is not clear, pays a huge amount).

VII. Choosing the Most Promising Type of ADR

See: ✶ Sander and Rozdeiczer, "Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to Mediation-Oriented Model," 11 Harv. Negotiation L. Rev. 1 (2006).

✶ CPR's Screen for Evaluating Cases for ADR – published in one iteration in September of 1998; may be available on the CPR website: www.cpradr.org/eval.htm

A. Determine which process options are available?

a. Mediation:

facilitative

evaluative

hybrid

b. Early Neutral Evaluation

c. Arbitration: non-binding or binding

d. Judicially hosted settlement conference

e. Summary jury or bench trial

f. Mini-Trial

h. Hybrids or sui-generis processes crafted in private sector to fit special needs or circumstances of particular cases.

Let the parties lead in making this decision – if they can agree on the process they would like to use.

B. In a discussion with counsel about which ADR process to use:

1. Begin by asking: What would be the **principal purposes** of the referral at this juncture? Stated differently:

➜ What are the most important objectives the parties would like to achieve through ADR at this juncture?

➜ What are the principal benefits that the parties would like ADR to deliver at this juncture?

Remind counsel that ADR can be useful for a variety of purposes even if settlement is not likely – or at least not likely at this time.

(a) Better than Rule 12 motions (or demurrers) for finding the center of the case.

(b) Efficient way to get a sense of the evidence and of the parties on the other side –
or a better sense of your own client.

(c) Good vehicle for teaching your own client – or helping increase your client's confidence in your competence and your advice.

(d) Good vehicle for identifying the primary barriers to settlement – so you can develop a plan to attack those barriers.

(e) A **'failed'** mediation can help your **client feel more centered** about going forward toward trial and about paying your bills by –

(1) helping the client feel that he did everything he reasonably could to try to reach an agreement and is therefore justified in going forward, and

(2) identifying more reliably the limits of what could be achieved through settlement and thus

making it clearer that the best course is to go forward with the litigation.

2. **If** the principal **purpose of ADR at this juncture is to settle** the case as soon as is feasible: **what are the principal barriers** to settlement in your case?

What might the principal barriers to settlement be?

a. Informational needs (really)?

b. Analytical needs – including confidence needed by lawyer and/or client

c. Emotional needs: anger, self-repair, venting, egos (clients/lawyers/everyone?)

d. Meter running (law firm budgeting)

e. Shelf-life of product/value of delay

f. Implications of the case for matters exterior to the litigation,

or concern about ripple effects of this case.

g. Lack of confidence by counsel and/or clients?

h. Other?

Once they have identified the principal objectives of the referral and the principal obstacles to achieving those objectives, the parties will be positioned to identify which type of ADR process provides the best tools for achieving their ends.